

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE:

SHOW CAUSE PROCEEDING
AGAINST TALK.COM, INC.

) OFFICE OF THE
EXECUTIVE SECRETARY

) DOCKET NO. 01-00216-18

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**TALK.COM'S FINAL REPLY BRIEF IN SUPPORT OF REQUEST TO TAKE
DEPOSITIONS OF COMPLAINING WITNESSES**

Respondent Talk.com Holding Corp., d/b/a/ Talk.com, ("Talk.com" or the "Company") by its attorneys, pursuant to the Pre-Hearing Officer's Order Supplementing Procedural Schedule, issued February 11, 2002, hereby submits this final reply brief in support of Talk.com's request to take depositions of selected complaining witnesses in this proceeding. As explained below, oral depositions of complaining witnesses are necessary to prepare Talk.com's defense to the preliminary findings of the Consumer Services Division ("CSD") of the Tennessee Regulatory Authority ("TRA" or the "Authority") in the Show Cause Order.

**I. DEPOSITIONS ARE REQUIRED TO PROVIDE TALK.COM WITH A
FAIR OPPORTUNITY TO DEFEND ITSELF**

Neither the CSD nor the Attorney General can seriously dispute that Talk.com has a right to conduct depositions of complaining witnesses. The right of an entity to confront its accusers is fundamental to our system of justice. *Cf.* U.S. Const. Amend. V (Right to Confront Witnesses); U.S. Const. Amend. XIV § 1 (Due Process Clause). To the extent that the CSD intends to rely on the statements of any complainant for the truth

of the matters asserted therein, Talk.com must be given an full and fair opportunity to conduct discovery of the witness and to cross-examine the witness's statement at trial. Depositions of certain complaining witnesses are necessary to provide Talk.com with an opportunity to examine the accuracy and completeness of the complainant's contentions. As Talk.com explained in its Brief in Support of Request to Take Depositions of Complaining Witnesses, filed on January 14, 2002, and reiterated in its Reply to the Response of the Consumer Services Division (CSD) of the TRA to Talk.com's Brief, filed January 18, 2002, depositions are required to investigate a number of allegations made in support of the slamming, cramming and "Do Not Call" allegations in this docket. In some of the slamming counts, the CSD relies on statements from a complaining witness who admits that he or she gave authorization to Talk.com, but now contends that the authorization was limited or contradicted by statements the witness allegedly made outside the taped TPV. Depositions are necessary to examine the substance of the allegedly limited authorization and the manner in which these limitations were communicated to Talk.com.

In addition, some witnesses now deny the authorizations they provided to Talk.com, or contend that the authorization was revoked after it had been given to Talk.com. In the case of an authorization that the witness now denies, Talk.com seeks to conduct a deposition to explore the validity of the witness's contentions. In the case of the allegedly revoked authorizations, Talk.com has no record of the witness's actions, and seeks to conduct a deposition to determine the facts and circumstances of the alleged revocation.

Similarly, to the extent that the Authority has jurisdiction to consider the cramming allegations presented by the CSD,¹ depositions are necessary to provide a fair opportunity to defend these allegations. A substantial percentage of the cramming counts involve alleged billing by Talk.com after the customer cancelled service. In many of these instances, the complaint was filed several months after the alleged cancellation occurred (sometimes only after the unpaid invoice was referred to collections by Talk.com). Talk.com's investigation thus far has not identified any evidence of such cancellation requests, and depositions would be necessary to identify crucial facts in dispute prior to the hearing. In light of its Motion to Dismiss these counts, however, Talk.com is willing to defer consideration of its deposition request as it relates to the Interstate Cramming Counts until after the Pre-Hearing Officer has ruled on that Motion.

Finally, as Talk.com explained in more detail in its Initial Response to the Show Cause, depositions of virtually all of the "Do Not Call" complainants will be necessary to determine facts relevant to defenses provided under the "Do Not Call" statute and regulations.² Issues such as the complainant's use of its lines for business purposes, its prior business relationships with the Company or its marketing partners, or the express consent of the subscribers are relevant to the defenses available to Talk.com.

II. DEPOSITIONS ARE NOT UNDULY BURDENSOME

The CSD and the Attorney General largely base their opposition to Talk.com's request on the assertion that depositions would be burdensome on the complaining

¹ See Motion to Dismiss of Talk.com, filed February 19, 2002 in this docket. Talk.com asserts that the Interstate Cramming Counts of the Show Cause Order are beyond the Authority's jurisdiction because they relate to bundled service packages offered by Talk.com, which are subject to the exclusive jurisdiction of the Federal Communications Commission.

² See Initial Response of Talk.com at 64-66, filed February 19, 2002 in this docket.

witnesses. Initially, Talk.com contends that any such burden must be weighed against Talk.com's due process rights, which strongly weighs in favor of depositions.

Nevertheless, depositions are no more burdensome than necessary in this case.

First, to dispel any suggestion, Talk.com does not seek depositions for purposes of harassment or delay. Talk.com does not seek to take depositions indiscriminately, but rather has selected potential candidates based solely upon whether the complainant has raised issues of fact that are in dispute. Listed in *Attachment A*, attached hereto, is Talk.com's *preliminary* list of deposition candidates, along with the areas of inquiry for each.³ This list demonstrates that Talk.com seeks only such depositions as are necessary in the context of this case.

Second, depositions provide protections that no other form of discovery can provide. A deposition is significantly better than informal interviews in this case because the issues raised are complex and fact-specific. It is much more effective than an informal interview because the formalities of a deposition help to focus the witness's attention and impart a seriousness to the inquiry that is commensurate with the level of penalties the CSD asserts in this case. Further, because a deposition constitutes testimony that is given under oath, it uniquely provides information that can be presented at trial in the event the witness recants testimony or contradicts statements previously made in this proceeding. Neither the CSD nor the Attorney General demonstrate that informal interviews provide an equivalent level of protection to Talk.com.

Finally, it would be inappropriate to arbitrarily limit either the number of depositions that Talk.com may take or the time of a deposition, as the Attorney General

³ Please note that this is a preliminary list. The Company respectfully requests the right to amend the list as discovery continues.

recommends. Talk.com must be given an opportunity to defend itself against *every* allegation made; not merely some number of allegations that a party may think is "fair enough." Unless the CSD withdraws some or all of its allegations, the number of depositions necessary to defend this case cannot be reduced. Similarly, depositions should not be subject to any arbitrary time limits. Although Talk.com anticipates that most depositions can and will be concluded promptly, arbitrary time limits are inappropriate in the face of possible witness intransigence and/or confusion. Moreover, parties will have the opportunity to object to repetitive or harassing questioning or to seek a protective order at an appropriate time if the party believes that a deposition is being conducted in an inappropriate manner.

III. CONCLUSION

For these reasons, depositions of complaining witnesses are necessary and appropriate in this case. Accordingly, Talk.com should be permitted to file notices of depositions forthwith.

Respectfully submitted,

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Dated: February 21, 2002

ATTACHMENT A

LIST OF DEPOSITION CANDIDATES

The following is Talk.com's initial list of expected deponents. Talk reserves the right to add or modify this list if additional information is discovered.

Deponent	Complaint/Count	Areas of Inquiry
Randy O'Neal	4/8-9	Alleged "poor customer service" causing delay, actions taken to return to carrier of choice.
Jim Landers (Whitts BBQ)	7/13-14	Disputed authorization over telephone number.
C. (Chris) Pat Anderson	10/19-20	Witness' prior knowledge of switch (local service switched to Talk.com and back to BellSouth on the same day); customer delay in returning local toll and long distance to carrier of choice.
Robert Whitaker	12/23-24	Disputed authorization (denies signing check).
Barbara DeBlasio	13/28-26	Disputed authorization; relationship with "family friend" who gave authorization.
Sharon Jones	14/27-28	Customer knowledge of switch; reasons for 63 day delay before disputing authorization; reasons for 90 day delay after return before filing complaint.
Joe and Rose Matthews (Matthews Towing)	16/31-32	Disputed authorization; disputed ownership of telephone numbers; reason for 7 month delay before disputing authorization; customer knowledge and consent to switch; reasons for delay in switching to a replacement carrier.
Pam Downen	17/33-34	Disputed authorization; allegedly limited authorization; actions taken to switch to a replacement carrier; reasons for failing to switch local toll promptly.
Dorothy Curvin	18/35-36	Disputed authorization; claims of a second switch; reason for delay in returning local service to BellSouth.

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Deponent	Complaint/Count	Areas of Inquiry
Laura Wilson	19/37-38	Disputed authorization.
Jeanette Deming	20/39-40	Disputed authorization; prior knowledge of switch (local service switched to Talk.com and back to BellSouth on the same day).
John Selkirk	21/41-42	Disputed authorization.
Gary Butler	22/43-44	Disputed authorization; disputed cancellation.
Janet Clare	23/45-46	Disputed authorization.
Lori Turbeville	24/47-48	Disputed authorization; scope of authorization.
Carol O'Gorman	25/49-50	Disputed authorization; 63 day delay in disputing authorization; delay in switching to replacement carrier; reasons for switching local to carrier of choice, but delay in switching local toll and, later, long distance.
Tim O'Gorman	25/49-50	Provided authorization disputed by Ms. O'Gorman.
Edith Brown	26/51-52	Disputed authorization; contact by BellSouth prior to switch; reasons for failure to cancel scheduled switch.
Lisa Switter	28/54-55	Disputed authorization.
K. L. Owen	29/56-57	Disputed authorization.
Carole A. Owen	29/56-57	Disputed authorization.
John Montgomery	30/58	Disputed cancellation.
Judy Beasley	31/59	Disputed authorization; use of dial around order.
Janice Keenan	32/60-61	Disputed authorization.

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Deponent	Complaint/Count	Areas of Inquiry
Michael Foster	33/62	Disputed authorization.
Lenore Wilson	34/63-64	Disputed authorization; prior knowledge of switch; relationship with Shanan Wilson who gave authorization contact by BellSouth prior to switch; reasons for customer failure to cancel schedule switch.
Patricia Ladison	35/65	Disputed cancellation; alleged billing after cancellation.
Bruce Efflandt	36/66	Disputed cancellation; alleged billing after cancellation.
DeLoris Greer-Carruthers	37/67	Authority over telephone number.
William Greer	37/67	Provided authorization disputed by Ms. Greer-Carruthers; circumstances of authorization and alleged cancellation.
Leah Sweeney	39/69	Disputed cancellation; alleged billing after cancellation.
Fred Parish	41/71	Alleged billing by Talk.com; relationship with DNS.
Lisan Parker	42/72	Disputed cancellation.
Cecilia Peterson	47/77	Disputed cancellation.
Betty Monroe	48/78	Disputed cancellation.
Buddy Hart	51/81	Disputed cancellation.
Beth Davis	52/82	Disputed cancellation.
John Montgomery	54/84	Disputed cancellation.
Veronica Castillo	55/85	Disputed cancellation.
Jack Whitman	57/87	Disputed billing for adult services.

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Deponent	Complaint/Count	Areas of Inquiry
Do Not Call Complainants (All)	94-149	Business activity conducted using telephone; prior relationship with company; express authorization.
Do Not Call Complainants (22)	94-98, 101-103, 105, 107, 108, 114, 115, 119, 121, 128, 131, 134, 140, 144, 146, 149	Disputed call to complainant.
Do Not Call Complainants (8)	108, 128, 131, 132, 134, 140, 144, 145	Timeliness of sign-up request; method of sign-up.